

FILED BY CLERK

NOV -1 2007

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

JOE SANTOS ARTIAGA,

Appellant.

2 CA-CR 2006-0294
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054798

Honorable Howard Hantman, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Katia Méhu

Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri

Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Joe Artiaga was convicted of one count each of theft of a means of transportation, criminal trespass, and possession of burglary tools. The trial court sentenced him to time served on the criminal trespass conviction and concurrent,

presumptive, enhanced prison terms of 11.25 years and 3.75 years, respectively, on the other two convictions. On appeal, Artiaga argues that his right to be present at a grand jury proceeding was violated and that the state's notice of prior convictions was untimely. Finding no reviewable issues, we affirm as modified.

¶2 Before trial, Artiaga successfully moved to remand the case to the grand jury for a redetermination of probable cause. He now argues his right to be present at the second grand jury proceeding was violated because the jail failed to give him his civilian clothing and because the state implied that his failure to appear was voluntary. But after the grand jury again indicted Artiaga, he had a jury trial and was found guilty beyond a reasonable doubt. He does not argue that any error in the grand jury proceeding affected the subsequent trial. Therefore, his conviction after that trial rendered moot any issue involving the grand jury proceeding. *See State v. Just*, 138 Ariz. 534, 541-42, 675 P.2d 1353, 1360-61 (App. 1983).

¶3 Artiaga acknowledges this general principle, but argues that “errors of constitutional magnitude in a Grand Jury proceeding warrant a post-conviction remedy.” In support of this argument, he cites *State v. Thomas*, 130 Ariz. 432, 636 P.2d 1214 (1981). But *Thomas* did not involve a challenge to a grand jury proceeding. Instead, the critical issue in *Thomas* was whether questioning a witness at trial on her religious beliefs for the purpose of bolstering her credibility was fundamental, reversible error. *Id.* at 436-37, 636 P.2d at 1218-19. Nothing in *Thomas* suggests that an error in a grand jury proceeding that had no effect on the subsequent jury trial could nevertheless be reviewed on appeal.

¶4 Artiaga further cites *Maretick v. Jarrett*, 204 Ariz. 194, 62 P.3d 120 (2003). *Maretick* involved an interlocutory challenge by special action. *See id.* ¶¶ 1, 7. Thus, the court did not, as Artiaga suggests, hold that a situation similar to his required reversal of a conviction. In *Maretick*, there was no conviction to reverse. Indeed, the court stated that “an indictment may be challenged only through interlocutory proceedings.” *Id.* ¶ 7. *Maretick* therefore supports the state’s position, not Artiaga’s.

¶5 Artiaga also argues the trial court abused its discretion by denying his motion to continue the trial so his counsel could obtain a transcript of the second grand jury proceeding. Artiaga does not argue that the denial of the continuance affected the trial, but rather that a continuance would have revealed alleged errors in the grand jury proceeding. Thus, the issue was “relevant only to the grand jury proceedings . . . [and] had no effect on the subsequent trial.” *State v. Verive*, 128 Ariz. 570, 575, 627 P.2d 721, 726 (App. 1981). It is therefore not reviewable on appeal. *See id.*

¶6 Artiaga next contends the state’s allegation that he had historical prior convictions for sentence enhancement purposes was untimely under A.R.S. § 13-604(P) and should have been dismissed. Although Artiaga cited § 13-604(P) below, it was in arguing that the state had not timely disclosed an item of evidence. He did not argue that the allegation of prior convictions was untimely. He thus failed to preserve this issue below and has forfeited review of this issue absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error applies when defendant fails to object below). “To prevail under this standard of review, a defendant must establish both

that fundamental error exists and that the error in his case caused him prejudice.” *Id.* ¶ 20. Artiaga does not argue that any error was fundamental or prejudicial. Therefore, he cannot sustain his burden in a fundamental error analysis.

¶7 For the foregoing reasons, we affirm Artiaga’s convictions. We note that the sentencing minute entry states that the offenses are “nonrepetitive.” But, as the court stated at oral pronouncement of sentence, the prison terms imposed are enhanced by two prior felony convictions. *See* A.R.S. § 13-604(C), (D); *see also State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999) (oral pronouncement of sentence controls when it conflicts with written judgment). Accordingly, we modify the sentencing minute entry to classify the offenses as “repetitive,” *see State v. Jonas*, 164 Ariz. 242, 245 n.1, 792 P.2d 705, 708 n.1 (1990), and affirm the enhanced sentences as modified.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge